PUBLIC PROSECUTOR

v.

FOM IT CHEONG

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[CRIMINAL TRIAL NO. 58-3 OF 1988]
4 SEPTEMBER 1990

CRIMINAL PROCEDURE: *Dangerous drugs - Raid on house - Arrest and seizure of drugs - Whether essential element of possession established - Whether accused had care and management of the premises - Custody and control - Benefit of doubt - Evidence should not be isolated - Possession of drugs must be exclusive - Section 114(g) of the Evidence Act 1950 - Presumptions under s. 37(b)(d) and (g) Dangerous Drugs Act 1952.*

The accused F was charged with the trafficking of heroin under the Dangerous Drugs Act 1952 (the Act). The room in which F was arrested contained a tin and packets containing heroin. The police were led into the room by one S who was jointly charged with F; the charge against S was subsequently withdrawn. The issue for the Court was whether F was in possession of the drugs. The drugs were not found in the F's hands or on his person but in 2 separate rooms.

The prosecution argued that since F was found in close proximity to the tin containing the drugs, the presumption under s. 37(d) of the Act applied.

Held:

[1] The prosecution had failed to establish that the accused had the care and management of the premises and therefore he could not be deemed to be the occupier thereof.

[2] The presumption under s. 37(g) of the Act could not apply against the accused and inasmuch as the drugs may have been concealed in the tin, it could not be presumed that the drugs were so concealed with the knowledge of the accused.

[3] A doubt was raised as to why no finger print dusting was carried out on the drug exhibits. The benefit of the doubt must be given to the accused; in addition, F's T'shirt shorts and nail diggings did not contain any traces of heroin.

[4] Upon a consideration of the evidence as a whole the Court found that the prosecution has failed to establish that F had custody or control of the drugs in question; therefore the presumption under s. 37(d) does not arise.

[5] The evidence points, as between S, and F, to S being in possession of the drugs.

[6] (a) Given the fact that S rented the said room, that S subscribed to the telephone and that it was S who led the police into the premises, it is surprising that the prosecution did not ask S what business or part F had in being on the premises.

(b) The failure so to ask gives rise to a presumption under s. 114(g) of the Evidence Act 1950.

[Prima facie case not made out by prosecution. Accused acquitted and discharged.]

Cases referred to:

Ho Seng Seng v. Rex [1951] MLJ 225
PP v. Foo Jua Eng [1966] 1 MLJ 197

Legislation referred to:
Common Gaming Houses Ordinance 1953, s. 4(1)(c)
Dangerous Drugs Act 1952, ss. 37(b), (d), (da), (g)
Evidence Act 1950, s. 114illus.(g)
National Language (Amendment) Act 1990, s. 2

For the accused - Teh Poh Teik; M/s. Abdul Raman Saad & Associates
For the prosecution - Seah Hock Thean, DPP

JUDGMENT

Richard Talalla JC:

In this trial the accused was charged as follows:

> Bahawa kamu pada 12 Disember 1987, jam lebih kurang 4.00 petang, di rumah No. 217, Batu 1 3/4, Jalan Buloh Kasap, Segamat, dalam Daerah Segamat, dalam Negeri Johor Darul Takzim, bagi pihak diri kamu sendiri atau bagi pihak sesiapa telah didapati mengedar dadah berbahaya, sejumlah berat 190.60 gram Heroin, dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The charge was read and explained to the accused who claimed trial to the charge.

Pursuant to the provisions of s. 2 of the National Language (Amendment) Act 1990 and after due consideration I ordered that in the interest of justice the proceedings be conducted partly in Bahasa Kebangsaan and partly in English.

The first witness for the prosecution was Police Inspector Nik Lokman. He testified that on 12 December 1987 at about 4 p.m. he proceeded with 7 police personnel and one Su Yong Heng (Su) to a house (the house) No. 217 Batu 1 3/4 Jalan Buluh Kasap. Segamat. On reaching the same he asked Su for the key to the house. Su produced the key. The Inspector then directed Detective Lance Corporal Dali (Dali) to open the door of the house. When the door was opened he directed two of his men to stand guard outside the house. At the same time he directed the rest of the police personnel to enter the house. He then directed another two of his people to guard the living room. He then together with Dali, Detective Chee (Chee), Detective Tan Law Heng (Tan) and Su proceeded to the 1st floor of the house. On reaching the same Inspector Lokman directed Tan to guard Su. At the same time Chee and Dali went to the back room of the house and there saw the accused lying down on a mattress. He was arrested. A search was carried out wherein Inspector Lokman seized a tin in that room which he opened and found therein a packet containing granules which he suspected to be heroin. Also in the tin were 3 empty drink packets containing 40 packets of serbuk dadah, 40 packets in each kotak. With the tin was a weighing scale. Inspector Lokman then together with the accused and Dali went to a room at the right of the 1st room which I shall refer to as the 2nd room. In this 2nd room the Inspector saw a tin which he found to contain a packet weighing approximately 1/2 lb. and 2 empty drink packets containing 53 packets each of a drug which he suspected to be heroin. He then directed one of his men to return to the police station to get the photographer who subsequently arrived and proceeded to take photographs of the scene and the items seized whereafter the accused was taken away to the police station together with the items seized. In cross-examination Inspector Lokman conceded that a visitor to the room in question would not have been able to see what was in the tin or in the packets. He also admitted that after recovery of the drugs inside the tins and the packets inside the drink packets, they were not dusted nor sent for testing as to identification by finger prints. The drugs were expertly tested and found to be heroin in quantity in the amount the subject matter of the charge.

The second witness for the prosecution was Inspector Mohd. Fauzi. He testified that Su was jointly charged with the accused for trafficking and that the charge against Su was subsequently withdrawn. He confirmed that Su was not released but rearrested. Inspector Fauzi testified that he presumed that Su was detained in regard to involvement in drug activity. Inspector Fauzi further testified that he took down the number of the telephone which was found in the first room. He testified that the subscriber to that telephone was Su. He went on to say in evidence that according to the landlord the house in question was rented by one Wong Yen Pen (Wong) and that subsequently the house was occupied by Su. This officer testified that the address of Wong was not available. He confessed to not having asked Su who Wong was.

The third prosecution witness was Su himself. He testified that his brother-in-law rented the house for him, that he, Su, sometimes stayed overnight in the house, that before he was arrested he had the key with him and that apart from himself, the accused and a person by the name of Ah Au had a key each. He said all this in examination-in-chief. In cross-examination he said that when he first saw the accused as he entered in the house he was already handcuffed and that he was then behind the main door of the house downstairs. He added in evidence that when he got down from the police car, it was the Inspector's car, he saw police who had arrived before he did, standing outside the door. He testified that he, Su, arrived with Inspector Lokman and a detective. This witness said that he did not know how the rest of the police party arrived. He then said in evidence that he arrived there first and that the rest of the police arrived later and he said that that was why he did not know how they arrived. This witness confessed that he knew a person by the name of Siong Tee and that before Su was arrested he was in the house with Siong Tee. Su confirmed having been initially charged with the accused. He also said that he told the police about Ah Au but that the police officer did not ask for more particulars about Ah Au. Su said that when the police withdrew the charge against him he was not really happy - because he was sent to Pulau Jerejak, a detention centre for persons involved in drug dealing. Detective Chee gave evidence corroborating the testimony of Inspector Lokman with regard to the raiding of the house, the tin in the first room which he said was by the side of a wall and the weighing scale.

Such was the case for the prosecution. Counsel for the accused thereupon submitted that no *prima facie* case has been established by the prosecution and that the accused ought to be acquitted and discharged without his defence being called. Counsel submitted that the essential element that the prosecution had to establish against the accused was that the accused was in possession of the drugs. A reference was made to several statutory presumptions which were favourable to the prosecution contained in the Act under which the accused was charged. The presumptions are as follows:

Section 37(b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises.

Section 37(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

Section 37(da) any person who is found in possession of (i) 15 grammes or more in weight of heroin, otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Section 37(g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

In order, as I see it, for the presumption under s. 37(b) to apply against the accused, the prosecution is required to prove beyond reasonable doubt that the accused had the care or management of the premises.

As to whether or not the accused could be said to have had the care or management of the premises the only evidence connecting the accused with the premises was the fact that he was present on the premises and the witness Su testifying to his having a key thereto. There was no evidence as to what his function or business was relative to the premises. Nowhere did Su testify as to what the position of the accused was with regard to the premises. None of the other witnesses spoke to anybody to support the prosecution case in this regard. On the contrary, on the evidence led, it was Wong who rented the premises in question. He rented the premises for his brother-in-law Su who occupied it. It was Su who was the subscriber to the telephone found in the room where the drugs in question were discovered. In the end I found that the prosecution failed to establish that the accused had the care and management of the premises and therefore he could not be deemed to be the occupier thereof. That being the case it had to follow that the presumption under s. 37(g) could not apply against the accused and inasmuch as the drugs may have been concealed in the tin, it could not be presumed that the drugs were so concealed with the knowledge of the accused.

For the presumption under s. 37(d) to apply it was necessary for the prosecution to prove that the accused had the tins containing the drugs in his custody or under his control.

In *Ho Seng Seng v. Rex* [1951] MLJ 225 at p. 226 Brown Ag. CJ said:

> I think that the element of knowledge is implicit in the word "custody" and in the word "control". "Custody" means watching over or keeping safe. You cannot watch over a thing or keep it safe unless you know it is there. Similarly you cannot have "control" of a thing unless you know it is there.

The drugs in question were not found in the hands or otherwise on the person of the accused but were found in 2 separate rooms. Inspector Lokman testified that a visitor to the room would not have been able to see the contents of the tins. The drugs were kept in the tins. Inspector Lokman further testified that no finger print dusting was done on the drug exhibits though this could easily have been done, and that finger-print dusting is normally done by the police. A doubt arises as to why this was not done. The benefit of that doubt must be given to the accused. According to the evidence of Inspector Fauzi the T-shirt, shorts and nail clippings of all the fingers of the accused were sent to the government chemist for examination. The chemist examined them but found them to contain no traces of heroin the drug in respect of which the accused was charged.

The case for the prosecution is that the accused was found in close proximity to the tin containing the drugs and reliance was placed on the judgment of Raja Azlan Shah J, now DYMM Yang di-Pertuan Agong, in *PP v. Foo Jua Eng* [1966] 1 MLJ 197. In that case the accused was charged under s. 4(1)(c) of the Common Gaming Houses Ordinance 1953. He was found in a room some three feet from a dressing table on which the incriminating evidence was lying. He had tried to close the door of the room on a police officer who was raiding it. The officer had to eventually force the door open. It was held that those facts had to give rise to the inference that the accused had possession of the incriminating article. As has been said repeatedly in the past, every case must be decided on its own particular facts. To

start with, in this case, there was no question of the police having to force themselves into the premises or the room in question or the accused putting up any resistance. In fact the first room was neither closed nor locked, nor was there evidence of the second room being closed or locked. I could not see myself considering in isolation the evidence of proximity in relation to the presumption of custody or control but rather all the evidence adduced by the prosecution. Upon a consideration of the evidence as a whole I find that the prosecution has failed to establish that the accused had custody or control of the drugs in question and therefore the presumption under s. 37(d) does not arise. I should say here that even the question of the proximity of the accused to the drugs was not conclusively established as I will explain shortly.

It is trite law that possession of the drugs must be exclusive and that the prosecution must prove that the accused and the accused alone was in possession of the drugs. To my mind the evidence points, as between Su and the accused, to Su being in possession of the drugs. It was Su who led the police to the premises. It was he who produced the key for the police to enter the premises. It was his brother-in-law who rented the premises and gave the same to him to occupy. It was Su who was the subscriber of the telephone which Inspector Lokman found in the room where the accused was lying when he was apprehended. Su was jointly charged as a co-accused in this case but the charge against him was withdrawn. He was promptly re-arrested in connection with drug trafficking activities, and detained and remained so at the detention centre in Pulau Jerejak. That Su was an accomplice cannot be questioned. The only evidence of the accused having a key to the premises comes from Su's lips. That evidence is in no way corroborated. It follows that there is a danger in convicting the accused on such evidence. Although 2 sets of keys were tendered in evidence there was no evidence as to how, from whom and under what circumstances these keys were seized. Certainly there was no evidence of any key or keys having been recovered from the accused. That being the case, the prosecution is left only with the evidence of Inspector Lokman and Chee that the accused was found by them to be lying on a mattress in the room where the drugs were originally found. But even in regard to that evidence there is uncertainty because according to Su, when he entered the house with the police raiding party he saw the accused downstairs handcuffed behind the main door and in this regard it has to be borne in mind that Inspector Lokman and Sergeant Dali accompanied Su who led them to the house which they then raided and the defence version as put to Inspector Lokman was that initially and before Inspector Lokman arrived at the house the police had already been there, arrested the accused and handcuffed him to the door.

There was no follow up of Wong who although he featured in the prosecution case remained a mystery as to the part he played in the transaction as did Siong Ti who according to the testimony of Su had been to the premises with Su before the arrest of the latter, and also Ah Au.

I take into consideration that drugs were found not only in the room where the accused was said to be lying on a mattress but also in another room which points to the drugs more likely being in the possession of Wong the tenant or Su the self confessed occupier or both of them rather than the accused.

Given that it was Su's brother-in-law Wong who rented the premises and gave it to the former to occupy, and that it was Su who subscribed to the telephone, that it was Su who led the police into the premises with a key he had on his person were the accused was found, either behind the main door downstairs handcuffed or lying down on a mattress in a room upstairs where the drugs was found, it is surprising that the prosecution did not ask Su when he

gave evidence what business or part the accused had in being on the premises. The failure so to ask gives rise to a presumption under s. 114(g) of the Evidence Act 1950 that if such a question was asked the forthcoming reply would have been one favourable to the accused to wit that he had nothing to do with the drugs found on the premises and consequently was innocent of the charge preferred against him in this trial.

According to the evidence of Inspector Lokman, Su was on the wanted list for drug activity, that Su was arrested first at his house from where he led Inspector Lokman and his police party to the house where the accused was found and also arrested. This is yet another factor pointing to a key figure in the affair. It was Su who possessed the knowledge to lead the police to the house where the drugs were eventually found.

Upon due consideration of the evidence led by the prosecution and the submissions of the respective Counsel I take the view that the prosecution had not made out a *prima facie* case upon which the accused should be called upon to answer. Accordingly the accused is acquitted and discharged.

Also found at [1991] 1 CLJ 160